No. 3934

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ONE BIG SIX STUDEBAKER AUTOMOBILE, TOOLS AND ACCESSORIES, AND HARVEY NOBLE,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF FACTS.

This is an action in rem brought November 26, 1921 (Tr., p. 2), by the United States under Section 3450 R. S. to forfeit One Big Six Studebaker Automobile driven by one Harvey Noble for its use on the 8th day of October, 1921, wrongfully and unlawfully to remove, deposit and conceal distilled spirits upon which

an Internal Revenue tax was imposed, to defraud the United States of said tax. Libel of Information was filed November 26, 1921 (Tr., p. 2), Petition to Intervene (Tr., p. 17), and Answer in Intervention (Tr., p. 19), were filed December 21, 1921, by one Charles Zuckerman claiming to be the mortgagee of said automobile. On the 22nd day of November, 1921 (Tr., p. 52), an information was filed against said Harvey Noble under the National Prohibition Act for transporting intoxicating liquors on the 8th day of October, 1921, without obtaining a permit or keeping a record. Thereafter (Tr., p. 58), on the 7th day of March, 1922, said Harvey Noble upon trial by jury was acquitted of said charge, and on the 14th day of March, 1922 (Tr., p. 24), said Charles Zuckerman as defendant and intervenor filed a supplemental answer, incorporating therein as additional grounds of defense, res adjudicata, by virtue of the acquittal of said Harvey Noble.

At the trial of the action it was stipulated between counsel appearing for the United States and Charles Zuckerman as defendant and intervenor, that the cause be submitted to the court without jury (Tr., p. 35), upon the evidence in the trial of United States vs. Harvey Noble, with the addition of such evidence as either side wished to offer (Tr., p. 36). Additional undisputed proof on behalf of the United States established that the distilled spirits involved in the case were of foreign manufacture without stamps or anything indicating payment to the United States of Internal Revenue tax, and that no permit had been granted to transport the same or that any tax had been paid the

customs for importation of them (Tr., pp. 61 to 65, inclusive). Defendant and Intervenor submitted proof showing him the mortgagee of said car (Tr., pp. 65 and 66).

By written opinion filed May 25, 1922, Court found in favor of the United States (Tr., pp. 37 to 46, inclusive).

Stripped of verbiage the said defendant and intervenor as Plaintiff in Error, sets up as error (1) that court failed to hold the acquittal of said Harvey Noble res adjudicata of this action, and (2) the holding that Section 3450 R. S. has not been repealed by the National Prohibition Act.

There has been no appearance by Harvey Noble in this action and he is not a party to this appeal. He made default (Tr., p. 68).

For convenience, Plaintiff in Error will be referred to herein as Appellant and the United States as Plaintiff.

ARGUMENT.

I.

Before discussing the authorities bearing upon the questions to be decided, a review and differentiation of certain provisions of the National Prohibition Act and Section 3450 R. S. (6352 C. S.) will lead to a clearer understanding of the matters before the court.

Section 6 of Title II of the National Prohibition Act prohibits the transportation of intoxicating liquors without a permit from the Commissioner of Internal

Revenue. Section 10 thereof provides that there can be no lawful transportation of intoxicating liquors, even after permit, unless a permanent record is kept showing amount and kind in detail, names and addresses of consignor and consignee and the time and place of transportation. Section 26 thereof provides, any officer discovering an unlawful transportation of intoxicating liquors by means of an automobile, shall at the time seize the car, arrest and charge the offender with such violation, and only upon conviction of the offender can the car be forfeited, and out of the proceeds of the sale must be paid all liens of intervening lienors, except those having knowledge of the unlawful use of the car. Section 29 thereof makes it a misdemeanor punishable by a fine not exceeding five hundred dollars for a violation of any of the above sections.

Section 3450 R. S. (Sec. 6352 C. S.) reads:

> "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax or any part thereof, * * * shall be forfeited; and in every such case * * * and every vessel, boat, cart, carriage, or *other conveyance* whatsoever, * * * used in the removal or for the deposit or concealment thereof respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to

defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. * * *"

It is to be seen that the National Prohibition Act and Section 3450 R. S. (Sec. 6352 C. S.) are two distinct and separate laws; the one ostensibly in furtherance of the 18th amendment to the Constitution of the United States to prevent the transporation and use of intoxicating liquors for beverage purpose, and the other to protect the revenue. This latter is more evident when considered in the light of sub-section (a) Section 600 of the Act of February 24, 1919 (40 Stat. 1057) establishing a tax on imported distilled spirits.

Before there can be a forfeiture under the National Prohibition Act, there must have been a seizure of the car at the time of the transportation of intoxicating liquors without a permit or record, and a conviction of the guilty party, and in the distribution of the proceeds from the sale of the forfeited property, the claims of innocent lienors are recognized and paid, before the government is entitled to any of the receipts.

Not so, however, with a forfeiture under Section 3450 R. S. (Sec. 6352 C. S.); this is strictly an action in rem under an act passed as a protection to the revenue and not in behalf of the morals of the nation, and despite the innocence of the owner or lienor, after proper proceeding the libelled article is sold; the conviction of a violator is not a condition precedent and the car is subject to forfeiture, whether seized at the time of the unlawful use or not.

The trial of United States vs. Harvey Noble being had under the National Prohibition Act, and this action having been instituted under Section 3450 R. S., the provisions of two different laws are invoked, based on different ideas, passed for dissimilar purposes and involving different kinds of issues, proof and procedure. In the transportation of intoxicating liquors, there could be a violation of both, of one or neither of these laws. Harvey Noble could have been charged by separate information or indictment under both these laws and tried at one or different times, or the offenses could have been consolidated in two or more counts in one information or indictment (Sec. 1024 R. S.) and the defendant put upon trial thereunder. A conviction or acquittal of one offense would not be res adjudicata or double jeopardy and a bar to trial and conviction of the other. Likewise the plaintiff herein cannot be estopped in this action on the grounds of res adjudicata or double jeopardy from proceeding against the offending automobile under Section 3450 R. S. simply because of the acquittal of Harvey Noble under the National Prohibition Act.

Burton vs. U. S., 202 U. S. 344, 378, 379, 380 and 381;

Ebeling vs. Morgan, 237 U. S. 625.

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the

other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Excerpt from opinion in Morey vs. Commonwealth, 108 Mass., 433, and quoted approvingly and adopted by Chief Justice Fuller, Carter vs. McClaughry, 183 U. S., 365, 395. See also, Bens vs. U. S., 266 Fed., 152; Moorehead vs. U. S., 270 Fed., 210, 212; U. S. vs. Butt, 254 U. S., 38, 42.

In Gavieres vs. U. S., 220 U. S., 338, an appeal was taken from conviction under penal code of Philippine Islands of charge of insulting a public official in the exercise of his office by word of mouth and in his presence, because defendant had previously on account of same words and conduct been convicted of disturbance charge under an ordinance of the City of Manila. On page 342 the court says:

"It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different."

Then follows an approval of words of court in Morey vs. Commonwealth, 108 Mass., 433, previously quoted. Court further says on page 343:

> "In Burton vs. U. S., 202 U. S., 344, 381, Bishops Criminal Law, Vol. 1, Sec. 1051, was quoted with approval to the effect, 'jeopardy is not the same when two indictments are so diverse as to preclude the same evidence from sustaining both.' In that case this court said, speaking of a plea of autrefois acquit, 'It must appear that the offense charged,' using the words of Chief Justice Shaw, 'was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they be connected in fact.*' "

On page 345 this conclusion is reached:

> "In the case at bar the offense of insult to a public official, covered by the section of the Philippine code, was not within the terms of the offense or prosecution under the ordinance. *While it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other.*" See Diaz vs. U. S., 223 U. S., 442.

Breaking and entering a post office and committing a larceny therein constitutes two offenses under Sections 190 and 192 P. C. Morgan vs. Devine, 237 U. S. Prosecution and trial of one does not bar prosecution and trial of the other.

"But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with requisite criminal intent and are such as are made punishable by the act of Congress." Id. p. 640.

"As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of the identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes." Id. p. 641.

Acquittal upon an indictment under the immigration laws, charging an alien with importation of an alien woman into the United States for immoral purposes, does not stand as res adjudicata for the deportation of the defendant under the same laws for the same offense. Lewis vs. Frick, 233 U. S., 291.

Section 281 Kelley's Federal Prohibition Digest (1922), on pages 61 and 62, under the title "Jeopardy," reads:

"The test when double jeopardy is claimed is whether the same evidence is required to sustain the same charges. If not, then the fact that both charges grow out of one transaction does not make a single offense when two are defined by statute."

U. S. vs. Sacein Rouhana Farhat, 269 Fed., 39;

Morgan vs. Devine, 237 U. S., 632.

"A conviction or acquittal on one indictment is no bar to a subsequent conviction and sentence upon another unless the evidence required to support the conviction upon one of these would have been sufficient to warrant conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes and if each statute required proof of an additional fact which the other does not, an acquittal or conviction under the same statute does not exempt the defendant from prosecution and punishment under the other."

Gavieres vs. U. S., 220 U. S., 338;
Carter vs. McClaughry, 183 U. S., 365;
Burton vs. U. S., 202 U. S., 344;
Kelley vs. U. S., 258 Fed., 392;
Manning vs. U. S., 275 Fed., 29.

Conviction and judgment against the person for the crime not prerequisite to action of forfeiture. Dobbins vs. U. S., 96 U. S., 395, 399.

"Cases arise, undoubtedly where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of pleading it is clear that the proceeding is one of criminal character; but where the information, as in this case, does not involve the personal conviction of the wrongdoer for the offense charged, the remedy of forfeiture claimed is plainly one of civil nature, as the conviction of the

wrongdoer must be obtained if at all, in another and wholly independent proceeding. 1 Bish. Cr. L., 6th Ed., Sec. 835 note 1; U. S. vs. Three Tons Coal, 6 Bliss., 379." Id. p. 399.

"Forfeiture in many cases of felony, did not attach at common law where the proceeding was in rem until the offender was convicted, as the Crown, Judge Storey says, had no right to the goods and chattels of the felon, without producing the record of his conviction; but that rule, as the same learned magistrate says, was never applied to seizures and forfeitures created by statute in rem, cognizable on the revenue side of the Exchequer Court, for the reason that the thing in such a case is primarily considered the offender, or rather that the offense is attached primarily to the thing, whether the offense is molum prohibitum or molum in se; and he adds, that the same principles apply to proceedings in rem in the admiralty. The Palmyra, 12 Wheat., 1." Id. p. 399. Goldsmith, Jr.—Grant Co. vs. U. S., 254 U. S., 505.

"But the merchandise is to be forfeited irrespective of any criminal prosecution * * * No condition is attached to the imposition of the forfeiture." Origet vs. U. S., 125 U. S., 240, 246.

Counsel for appellant place chief reliance upon the case of Coffey vs. U. S., 116 U. S., 436, as basis for the effort to reverse Judge Bourquin under the theory of res adjudicata or double jeopardy. However, that case is easily distinguishable from the present one. A

close examination shows this case not only does not hold contrary to the decision of the District Court but actually supports it. The Coffey case, supra, establishes the rule that where an acquittal has resulted in the trial of a defendant under a charge of violating an internal revenue statute, such result is res adjudicata of a subsequent action in rem brought under the same law to forfeit the property of the defendant involved in the transaction, the "issue" or "act or fact denounced" having been tried in the criminal proceeding.

Counsel for appellant (Brief Pl. in Error, p. 7), at the outset, in attempting to show the Coffey case supra, in point, beg the question with a large "If," saying:

> "If both the criminal action and the action in rem against the car had been brought under the Internal Revenue Act, the case of Coffey vs. United States, 29 Law Ed., 681, would be conclusive."

The facts in the present case do not conform to those in the Coffey case supra, hence the holding in the latter is not to be taken as controlling herein.

Quotation of Counsel (Brief Pl. in Error, pp. 8 and 9), from the Coffey case (supra), is not exact, the language of the court on page 443 (supra), is as follows:

> "It is true that the proceeding to enforce the forfeiture against the res named must be a proceeding in rem and a civil action, while that to enforce the fine and imprisonment must be a

criminal proceeding, as was held by this court in The Palmyra, 12 Wheat., 1, 14. Yet, where an issue raised as to the *existence of the act or fact* denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a *particular person,* that judgment is conclusive in favor of *such person,* on the subsequent trial of a suit in rem by the United States, where, as against *him,* the existence of the *same act or fact* is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem."

The foregoing is the meat of the ruling by the court, and an analysis will show that it does not govern the matter at hand. The "act or fact denounced" and tried in U. S. vs. Harvey Noble was a violation of the National Prohibition Act for transporting intoxicating liquors without pemit and keeping a record. Judgment of acquittal negatives the "existence" of the allegation. But the "act of fact denounced" in the libel proceeding was the use of a Studebaker automobile by Harvey Noble to remove, deposit and conceal distilled spirits in fraud of the revenue. "Existence" of such allegation was not tried in the criminal proceeding, and the record shows no acquittal of such charge; hence no res adjudicata.

To invoke res adjudicata or former jeopardy on grounds of acquittal in criminal action, the "judgment of acquittal" must have been "rendered in favor of a *particular person,*" and only "is conclusive in favor of *such person,*" on "the subsequent trial of a suit in rem,"

where "the existence of the same act or fact is the matter in issue," as cause for forfeiture. Charles Zuckerman was not the "particular person" or "such person" in the action of U. S. vs. Harvey Noble.

Quoting again from Coffey case (supra), p. 443:

> "When an acquittal in a criminal prosecution in behalf of the government is pleaded, or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same."

It follows then with the Coffey case (supra), as authority, that the parties must be the same. Here the parties are not the same. Harvey Noble never made appearance, and Charles Zuckerman came in voluntarily as intervenor; the parties herein are the United States and Charles Zuckerman; identity of parties being non existent, appellant cannot logically contend for the application of res adjudicata on the strength of the above decision.

Further in said case, it is announced:

> "This doctrine is peculiarly applicable to a case like the present, where in both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. (Different in present case.) The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute and foundation of any

punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis for any statutory punishment denounced as a consequence of the existence of the facts."

Again it is easily observed that the opinion of the said Coffey case cannot be used in the adjustment of the present matter. The intervenor here, unlike the claimant there, was not a party to the criminal action, and the criminal and libel actions here not based on the same law as there. Intervenor can no more logically set up res adjudicata here, than he could former jeopardy were he to be charged criminally, either under the National Prohibition Act or Section 3450 R. S., which could be done because it was ascertained at the trial of U. S. vs. Harvey Noble that intervenor was in the car with Noble at the time of the alleged offense (Tr., p. 73).

> "The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent." Ariget vs. U. S., 125 U. S., 240, 246.

This decision destroys contention of counsel for appellant in respect to res adjudicata and jeopardy, and a reading at the bottom of p. 246 and top of p. 247, shows court wavering on the soundness of Coffey

vs. U. S. (supra). People vs. Snyder, 86 N. Y. Sup., 415; Micks vs. Mason, 108 N. W., 707, 11 L. R. A., N. S., 653; Kansas vs. Rooch, 112 Pac., 150; 31 L. R. A., N. S., 670.

Counsel for appellant seem to loose the point in Chantangco vs. Abaroa, 218 N. S., 479 (Br. Pl. in Er. p. 11). Point in that case is, that where statute creates civil liability for malicious destruction of property, and makes conviction in criminal action condition precedent to recovery, such prerequisite must exist before civil action is allowed. Acquittal of defendant on criminal charge barred civil action. Without statutory obstruction action could have been maintained regardless of the criminal case.

II.

For support of assignment of errors 6, 7 and 8 (Tr., pp. 4 and 5), Counsel for Plaintiff in Error argue (Appellant's Brief, pp. 22 to 31 inclusive), that Section 3450 R. S. has been repealed by the National Prohibition Act and cite authorities in support thereof and quote therefrom. The question of the repeal of Section 3450 R. S. as contended by Plaintiff in Error is now before this Honorable Court in the case of E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error vs. The United States of America, Defendant in Error, case No. 3865, being an appeal from the United States District Court for the District of Montana. Reference is respectfully made to the brief of the Defendant in Error in that action. Ful-

some discussion of this point is not deemed necessary. Courts are not in agreement upon this question. The following decisions hold that Section 3450 R. S. has not been repealed by the National Prohibition Act:

U. S. vs. One Essex Touring Auto (D. C. Ga.), 260 Fed., 746; 266 Fed., 138;

U. S. vs. One Haynes Auto (D. C. Fla.), 268 Fed., 1003;

U. S. vs. One Bay Horse et al (D. C. Ga.), 270 Fed., 590;

U. S. vs. One Cole Auto (D. C. Mont.), 273 Fed., 934;

Duval vs. Dyche (D. S. Ga.), 275 Fed., 440;

U. S. vs. One Essex Touring Auto (D. C. Ga.), 276 Fed., 28;

The Tuscan (D. C. Ala.), 276 Fed., 55;

Payne vs. U. S. (5th C. C. A.), 279 Fed., 112;

Reo Atlantic Co. vs. Stern (D. C. Ga.), 279 Fed., 422;

U. S. vs. One Buick Roadster (D. C. Mont.), 280 Fed., 517.

III.

In discussion of assigned errors 9, 10 and 11 (Tr., p. 94) (App. Brief, pp. 31, 32 and 33), Counsel for Plaintiff in Error assume the repeal of Section 3450 R. S. and conclude that any tax levied upon the intoxicating liquors, i. e. distilled spirits (Tr., pp. 61, 62 and 63), involved in this case must have been imposed or due under title three of the National Pro-

hibition Act. It is the contention of Defendant in Error that Section 3450 R. S. has not been repealed and that the tax levied and due upon said liquors are provided specifically for by sub-section (a) of Section 600 of Act of Congress, February 24, 1919, 40 Stat. 1057.

WHEREFORE, Defendant in Error respectfully submits that the judgment of the District Court be affirmed.

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